

OPINION NO. 96-002**Syllabus:**

Pursuant to R.C. 145.297(C)(1)(a), an elected official of an employing unit who is also an employee of that employing unit may not participate in a retirement incentive plan adopted by the employing unit under R.C. 145.297.

To: Richard E. Schumacher, Executive Director, Public Employees Retirement System, Columbus, Ohio

By: Betty D. Montgomery, Attorney General, January 22, 1996

You have submitted an opinion request in which you ask, "whether an elected official of a public employer who also holds a non-elected position for the same employer is eligible to participate in the employer's plan under R.C. 145.297." By way of background, your request states that, "[t]he public employer in question, a charter city, has approved an ERI [retirement incentive plan] for the period January 1, 1995 through December 31, 1995.... By charter and ordinance the mayor appoints the safety director, and he may appoint himself to this position.... The current mayor is also the safety director."

Membership in the Public Employees Retirement System

In order to answer your question, it is first necessary to explain the general scheme governing membership in, and retirement under, the Public Employees Retirement System (PERS). Pursuant to R.C. 145.03(A): "A public employees retirement system is hereby created for the public employees of the state and of the several local authorities mentioned in [R.C. 145.01]. Except as provided in division (B) of this section,¹ *membership in the system is compulsory upon being employed and shall continue as long as public employment continues.*" (Footnote and emphasis added.) For purposes of R.C. Chapter 145, the term "public employee"

¹ R.C. 145.03(B) creates an exemption from membership or contribution for a student who is employed by the school, college, or university in which he is enrolled and regularly attending classes.

includes "[a]ny person holding an office, *not elective*, under the state or any ... municipal corporation, ... or employed and paid in whole or in part by the state or any of the authorities named in this division in any capacity not covered by [R.C. 742.01, R.C. 3307.01, R.C. 3309.01, or R.C. 5505.01]." R.C. 145.01(A)(1) (emphasis added). Thus, a person who is employed and paid in whole or in part by a municipal corporation in a capacity not covered by any of the Revised Code sections enumerated in R.C. 145.01(A)(1), is a public employee for purposes of R.C. Chapter 145, and must be a member of PERS.² R.C. 145.20 also permits an elective official of the state or any political subdivision thereof having employees in PERS to become a member of PERS. An elective official of a city may, therefore, elect to become a member of PERS. Pursuant to R.C. 145.41, "[m]embership shall cease upon refund of accumulated contributions, death, or retirement except as provided in [R.C. 145.362]."³

Retirement Incentive Plans

R.C. 145.297 provides for the establishment of retirement incentive plans, as follows:

(A) As used in this section, "*employing unit*" means:

(1) *A municipal corporation, agency of a municipal corporation designated by the legislative authority, ... or other political subdivision or unit of local government.*

....

(B) An employing unit may establish a retirement incentive plan for its eligible employees.... In the case of a municipal corporation or an agency of a municipal corporation, decisions on whether to establish a retirement incentive plan and on the terms of the plan shall be made by the legislative authority.

....

A retirement incentive plan shall provide for purchase by the employing unit of service credit for eligible employees who elect to participate in the plan and for payment by the employing unit of the entire cost of the service credit purchased.

....

No employing unit shall have more than one retirement incentive plan in effect at any time.

(C) Any classified or unclassified employee of the employing unit who is a member of the public employees retirement system shall be eligible to participate in the retirement incentive plan *established by his employing unit* if he meets the following criteria:

² R.C. 145.012 excludes certain persons from the definition of "public employee" set forth in R.C. 145.01(A). R.C. Chapter 145 also creates specific exemptions from membership in the Public Employees Retirement System. *See, e.g.,* R.C. 145.031 (certain employees of the Hamilton County Municipal Court); R.C. 145.035 (certain employees of the Department of Development who are principally located outside of the United States).

³ R.C. 145.362 states in part: "A disability benefit recipient shall retain his membership status. Also, he shall be considered on leave of absence from his position of employment during the first five years following the effective date of a disability benefit, notwithstanding any contrary provisions in this chapter."

(1) The employee is *not* any of the following:
 (a) *An elected official*;
 (b) A member of a board or commission;
 (c) A person elected to serve a term of fixed length;
 (d) A person appointed to serve a term of fixed length, other than a person appointed and employed by his employing unit.

(2) The employee is or will be eligible to retire under [R.C. 145.32, R.C. 145.34, R.C. 145.37, or R.C. 145.33(A)] on or before the date of termination of the retirement incentive plan. Service credit to be purchased for the employee under the retirement incentive plan shall be included in making such determination.

(3) The employee agrees to retire under [R.C. 145.32, R.C. 145.34, R.C. 145.37, or R.C. 145.33(A)] within ninety days after receiving notice from the public employees retirement system that service credit has been purchased for him under this section.

....

For each year of service credit purchased under this section, the employing unit shall pay an amount equal to the additional liability resulting from the purchase of that year of service credit, as determined by an actuary employed by the public employees retirement board. (Emphasis added.)

Thus, R.C. 145.297(B) permits each employing unit to determine whether to adopt a retirement incentive plan for its employees. However, an employing unit may have only one such plan in effect at any time. *Id.* R.C. 145.297(C)(2) and (3) prescribe certain requirements for participation that must be met by all "classified and unclassified" employees of the employing unit who are members of PERS. R.C. 145.297(C)(1), however, makes such an employee ineligible to participate in a retirement incentive plan established by his employing unit if he holds any of the positions described in R.C. 145.297(C)(1)(a)-(d). In most cases, a person holds only one position, and if that position is one of those listed in R.C. 145.297(C)(1)(a)-(d), he is ineligible to participate in his employing unit's retirement incentive plan. The question arises, however, as to the scope of these criteria when considering the eligibility of a person who holds two positions with an employing unit, only one of which is a position listed in R.C. 145.297(C)(1).⁴

The person about whom you ask is serving as a city employee, while also serving as an elected official of that city. You question whether the provisions of R.C. 145.297(C)(1)(a) prohibit this person from participating in a retirement incentive plan that has been adopted by the city, which, according to information provided by your staff, is his "employing unit" in his position as an employee, as well as in his position as an elected official. Although the person you describe is in a position of city employment that is not an elective office, he is, at the same time, holding a second position as an elected official of the city. While the General Assembly may not have contemplated a situation where a single person holds two such positions, the prohibition of R.C. 145.297(C)(1)(a) is clear, and thus allows for no interpretation. *See generally Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902) (syllabus, paragraph two).

⁴ Whether R.C. 145.297(C)(1)(a) would also prohibit a person who is an employee of one employing unit and an elected official of another employing unit from participating in the retirement incentive plan offered by the former employing unit is a situation that is not addressed in this opinion.

Pursuant to R.C. 145.297(C)(1)(a), an elected official of an employing unit is ineligible to participate in that employing unit's retirement incentive plan, whether or not he holds another position with that employing unit that is not a position listed in R.C. 145.297(C)(1)(a)-(d). More specifically, R.C. 145.297(C)(1) does not except from the disqualification set forth in R.C. 145.297(C)(1)(a) an elected official who is, in addition, an employee of the same employing unit. *See generally Columbus-Suburban Coach Lines, Inc. v. PUCO*, 20 Ohio St. 2d 125, 127, 254 N.E.2d 8, 9 (1969) (in determining legislative intent, it is necessary "to give effect to the words used, not to delete words used or to insert words not used"). Because the person about whom you ask is an elected official of the city in whose retirement plan he would like to participate, the plain language of R.C. 145.297(C)(1)(a) disqualifies him from participating in the city's retirement incentive plan, even though he is also an employee of that city.

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that, pursuant to R.C. 145.297(C)(1)(a), an elected official of an employing unit who is also an employee of that employing unit may not participate in a retirement incentive plan adopted by the employing unit under R.C. 145.297.